No. 12068

IN THE

United States

Court of Appeals

For the Ninth Circuit

FRANK M. SIEGMUND,

Appellant,

vs.

GENERAL COMMODITIES CORPORATION, LIMITED, WM. H. HEEN, ERNEST K. KAI and THELMA M. AKANA,

Appellees.

Appeal from the District Court of the United States for the District of Arizona (Ling, J.)

APPELLANTS REPLY BRIEF

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RESPONSE TO MOTION TO DISMISS APPEAL

The appellees have filed their motion to dismiss the appeal of the appellant, Frank M. Siegmund, basing their motion on two grounds, the first being that the United States Court of Appeals is without jurisdiction to entertain this appeal for the reason that the order appealed from is not a final order and there-

fore is not an appealable order. They argue that the action as to all defendants arose out of the same subject matter and that all defendants were sought to be held jointly liable, and that while the action was dismissed against the appellants on jurisdictional grounds, it remains standing in the District Court as to the defendants W. T. Davis, The Black Corporation and the White Corporation.

The contention may be disposed of insofar as the defendants The Black Corporation and the White Corporation are concerned at the outset. The record discloses that no process was served upon said defendant corporations (R. 17 a-b) and in fact the complaint (R. 9) alleges that the plaintiff did not know whether such corporations were in existence. The right to appeal is not affected nor denied by the absence of a decree as to parties who were named in the action but not served with process.

Bradshaw v. Miners' Bank of Joplin, 81 Fed. 902, 26 C.C.A. 673;

4 Corpus Juris Secundum 201;

2 American Jurisprudence 866.

As to the action remaining pending against the defendant Davis, it is established that where dismissal of an appeal would work a hardship or injustice upon the appellant, the appeal will be allowed despite the fact that the case remains undecided in the lower court against other parties to the action regardless of how joint or several their interests may be and regardless of the effect the appeal may have upon the issues pending below. This rule as to cases of hardship or injustice supersedes all rules as to appeals against some defendants while the action remains pending below as to others.

As stated in *Attorney General v. Pomeroy,* — Utah —, 73 P. (2d) 1277, 114 A.L.R. 726:

> "That important policy of law that cases cannot be appealed piecemeal is subject to a still more paramount principle, and that is that injustice and hardship must be avoided whenever possible."

See also: Annotation 80 A.L.R. 1192;
Annotation 114 A.L.R. 760;
4 Corpus Juris Secundum 199-201;
2 American Jurisprudence 866.

There appears no doubt that a dismissal of this appeal would work a great hardship and injustice upon the appellant and would in fact place him in an impossible situation. The dismissal by the District Court as to the appellees was upon a single jurisdictional ground involving the constitutionality of the diversity of citizenship statute and did not treat the merits of the action. Had an appeal not been taken at that time the time for taking appeal would have passed before further action in the District Court and the appellant might well have found himself without further remedy in either that Court or this Appellate Court as against the appellees. Even if appeal were allowed against these appellees after disposition of the case against Davis in the trial court, an extremely doubtful hypothesis, two exceedingly expensive trials would be required in the trial court involving substantial duplication of evidence. Even though the defendant Davis was retained before the District Court, the nature of the case as disclosed by the complaint (R. 2-16) is such that it would be virtually impossible to procure the necessary evidence and establish a cause of action

against him in the absence of the appellees from the case. Thus, for all practical purposes, the case remaining below should be treated as finally disposed of as to the defendant Davis as well as to the appellees, and a dismissal of this appeal would have the effect of depriving the appellant of relief against any of the parties to the action, an undeniable hardship and injustice. The appellant had no recourse whatever except pursuing this appeal. The foregoing elements of law and fact existed with substantial similarity in *Attorney General v. Pomeroy, supra,* and were there held to constitute such hardship and injustice as to justify the appeal.

The rule urged by appellees that an appeal should be dismissed as not founded upon a final order where some parties to the action remain before the trial court is not applicable where the issues or causes of action against the dismissed parties and the remaining parties are severable and not interdependent.

United States v. River Rouge Improvement Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339;

Hill v. Chicago & E. R. Co., 140 U. S. 52, 11 S. Ct. 690, 35 L. Ed. 331;

Annotation 80 A. L. R. 1192;

Annotation 114 A. L. R. 761;

4 Corpus Juris Secundum 201;

2 American Jurisprudence 866.

The complaint in this action (R. 2-16) sets forth two separate causes of action, the first against the defendant General Commodities Corporation, Limited, for breach of a contract therein set forth, and the second against said corporation, an appellee

herein, the appellees Heen, Kai and Akana and the defendant Davis for engaging in a conspiracy and acts pursuant thereto to divest said corporation of certain assets and cause such assets to be distributed to themselves for the purpose of defeating a recovery by the plaintiff. These separate causes of action are severable and independent in that a recovery against the corporation on the first count is in no way dependent upon the result of the second. The fact that the action remains undisposed of against the defendant Davis does not preclude finality of the order of dismissal against the corporation on the first cause of action, nor, in fact, does it preclude finality of the order as to the other appellees as several conspirators.

Curtis v. Connly, 264 Fed. 160, affirming 259 Fed. 961, Affirmed, 257 U. S. 960, 42 S. Ct. 100, 66 L. Ed. 222.

As their ground number II for their Motion to Dismiss this appeal, the appellees contend that no question of error has been presented to this Appellate Court for the alleged reason of failure by the appellant in his brief to observe rule 20, subdivision 2 (d) of the Rules of this Court which requires that a specification of errors relied upon shall be set forth separately and particularly, individually numbered.

In support of this contention, the appellees in their brief cite five decisions of this Court which they advance as authority for the proposition that when alleged error is not specified in appellant's brief as required by the rule, such error will not be considered and that the appeal should therefore be dismissed. An examination of the cases cited by appellees reveals that all are extreme cases wherein it was virtually impossible to determine the nature of the points

urged as error, either by a failure to set forth the error urged, or by reason of such deficiency in the record and in the brief that rulings or matters of evidence contended to constitute error were not presented to the Court. In most of the cases cited, the Court proceeded to examine and determine the existence or non-existence of error despite the failure to assign such error in the manner prescribed by the Rules of this Court.

In the instant case, no doubt whatever can exist as to the specific error assigned by the appellant. In the transcript of record (R. 71-72) the appellant stated as a point to be relied on,

> "The District Court erred in concluding that the Act of Congress passed in 1940, 28 U. S. C. A. 41, amending Section 24, subdivision 1, of the Judicial Code, is unconstitutional."

It was also therein stated that the Court erred in dismissing the action against the appellees. Error in dismissing the action against the appellees was urged on page 23 of appellant's brief and as stated on page 1 of appellant's brief only one ground for dismissing the action as against the appellees was relied upon by the District Court, that being a finding that the Act of Congress passed in 1940, 28 U. S. C. A. 41, amending Section 24, Subsection 1 of the judicial code is unconstitutional. The facts stated on page 2 of appellant's brief set forth that the appellant is a citizen of the State of Arizona, and that the appellees are all citizens of the Territory of Hawaii. The statute and the constitutional provisions involved are set forth in appellant's brief and the question of the constitutionality of the statute above cited is the only point discussed in the argument set forth in

appellant's brief. The error thus assigned is unmistakable.

The appellees' second ground for their Motion to Dismiss this appeal is therefor untenable.

RESPONSE TO APPELLEES POINT OF LAW NUMBER 1

In their point of law number 1, appellees urge the unconstitutionality of the Act of Congress of April 20, 1940, amending Section 41 (1) of Title 28 United States Code, specifically authorizing actions in the District Courts of the United States between citizens of a state and citizens of a territory. In their argument appellees cite cases heretofore cited by the appellant in his brief, which said cases were discussed therein by the appellant. We deem it unnecessary to burden the record with a repetition of the statements and arguments contained in appellant's brief.

The appellees cited and quoted from but one case not discussed in the appellant's opening brief, *City of Indianapolis vs. Chase National Bank,* 314 U. S. 63, 62 S. Ct. 15, 86 L. Ed. 47. An examination of that case reveals that it involved a factual situation and a point of law entirely foreign to the facts and point here at issue. That action was between citizens of different states of the United States and it appeared that a party named as a defendant was, from an examination of the true significance of the facts, aligned on the same side of the controversy as the plaintiff, the court invoking the ruling that in determining the existence of diversity of citizenship, the parties must be construed as plaintiffs or defendants

according to their actual interest in the controversy regardless of how they may have designated themselves. The case did not involve diversity of citizenship between citizens of a state and of a territory, and thus did not treat the full judicial power of the United States as contained in the Constitution. No question of the propriety of denying to any segment of the citizenry of the United States the use of Federal Courts granted to other citizens or to foreigners was considered. The arguments set forth in appellant's brief on the point involved have not been refuted.

RESPONSE TO APPELLEES' POINT OF LAW NUMBER II

The appellees advance a point of law designated in their brief as their point of law number II, to the effect that the appellant cannot maintain an action against the officers and stockholders of a corporation who have wilfully caused its assets to be diverted to themselves pursuant to a conspiracy to divest the corporation of its assets for the purpose of defeating a recovery by the appellant, unless he first exhausts his remedies against the corporation and unless the corporation be insolvent.

This precise point was urged in the District Court in the form of a Motion and an Amended Motion of the defendants Davis, Heen, Kai and Akana to Quash Return of Service of Summons and Dismiss Action (R. 56) and was set out with particularity in the memorandum accompanying said Motion and referred to therein. That grounds of the motion was by necessary implication overruled by the District Court by its Order of Dismissal of July 3, 1948 (R. 68) which dismissed the action as against the appel-

lees on the sole ground of a finding that the Act of Congress amending Section 24, Subdivision 1 of the Judicial Code was unconstitutional. That the ground now urged by the appellees was overruled in the District Court further appears from the fact that the defendant Davis was retained in the case below although his status therein was identical with that of the appellees as to the point of the conspiracy and acts pursuant thereto. The point now urged by the appellees goes to the merits of the cause of action and is substantive rather than jurisdictional.

The point having been urged by the appellees in the District Court and there overruled, they cannot now raise it here without having taken a cross appeal or writ of error from the District Court's overruling thereof. This rule is well stated in 3 American Jurisprudence 362 (Appeal and Error, Section 821) as follows:

> "An appeal brings up for review only that which was decided adversely to the appellant. The part of a judgment favorable to him is not reviewable if the respondents do not appeal."

See also: *Loudon v. Taxing District,* 104 U. S. 771, 26 L. Ed. 923;
3 American Jurisprudence 403 et. seq., (Appeal and Error, Section 866).

Since the point urged as appellees' number II is not properly before this Appellate Court, appellant respectfully moves and urges that the same be stricken.

Even if the point were properly before the Court on appeal, it is groundless. The complaint shows by

necessary implication that the conspiracy and acts pursuant thereto complained of have made and will make the appellee corporation insolvent and unable to make payment of its obligation to the appellant. This is alleged to be the express purpose of the appellees' actions in that regard. The complaint alleges that the non-corporate defendants are the sole officers and stockholders of the defendant General Commodities Corporation, Limited and that they alone control the corporation which is in effect their alter ego, and further, that they formed the corporation for a single purpose and will cause it to be dissolved upon the accomplishment of that brief purpose. It is therein alleged that the appellants are engaging and have engaged in knowing and willful acts for the express purpose of defrauding the appellant. Under such circumstances it is not necessary for the appellant to first exhaust all remedies against the corporation, itself a conspirator, before looking to the other appellees.

Bates v. Brooks, 270 N. W. 867 (Iowa);

Meredith v. Johns, 1 H. & M. (11 Va.) 585;

Mott v. Danforth, 6 Watts (Pa.) 304, 31 Am. Dec. 468;

Merchants & Manufacturers Nat. Bank of Pittsburg v. Tinker, 158 Pa. 17, 21 A. 838.

CONCLUSION

For the foregoing reasons it is submitted:

1. That this appeal should not be dismissed on either of the grounds urged by the appellees.

2. That the appellees have not established their claim of unconstitutionality of the 1940 amendment

to Section 41 (1) of Title 28, United States Code.

3. That appellees' point of law number II is not properly before this Appellate Court and should be stricken from this appeal; that even if that point were properly before this Court, it is not well taken.

It is therefore earnestly urged that the District Court erred in finding the 1940 amendment to Section 41 (1) of Title 28, United States Code unconstitutional and that the Court's order should be reversed and the dismissal against the appellees set aside.

Respectfully submitted,

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